Smith Industrial Maintenance Corporation d/b/a Quanta *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, and its Local 174. Case 7–CA–52097

September 30, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On January 29, 2010, the National Labor Relations Board issued an Order[1] granting in part and denying in part the General Counsel's Motion for Default Judgment, finding that the Respondent violated Section 8(a)(5) of the Act by violating the provisions of its current contract with the Union by failing to (1) make Independent Retirement Account (IRA) contributions; (2) compensate unit employees for work they performed; (3) provide health insurance; (4) deduct and remit union dues pursuant to valid dues-checkoff authorizations; and (5) accept and bargain with the Union about a contractual grievance filed on behalf of a unit employee. However, in the absence of a majority to grant the motion in full, the Board denied the motion in part, without prejudice, "as to the allegations that the Respondent (1) unlawfully caused the terminations of its employees William Blunk, William Kachigian, James Powers, Kenneth Robinson, Welton Seawright, and John Blunk, and (2) repudiated its contract with the Union."[2]

Subsequently, on February 10, 2010, the General Counsel issued an amended complaint and notice of hearing, alleging that the Respondent, by its alleged conduct in failing to comply with various contractual requirements without the Union's consent and in violation of Section 8(d) of the Act, is failing to adhere to the core economic provisions of its current contract with the Union. The amended complaint also alleged that this conduct is inherently destructive of employee rights guaranteed in Section 7 of the Act, and that the Respondent caused the termination of the named employees by its conduct. The Respondent again failed to file an answer.

Accordingly, on March 11, 2010, the General Counsel filed a renewed motion for default judgment with the Board. On March 12, 2010, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the renewed motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Renewed Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the amended complaint affirmatively stated that unless an answer was received by February 24, 2010, the Board may find, pursuant to a motion for default judgment, that the allegations in the amended complaint are true. Further, the undisputed allegations in the General Counsel's renewed motion disclose that the Region, by letter dated February 25, 2010, notified the Respondent that unless an answer was received by March 4, 2010, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file an answer or a response to the Notice to Show Cause, we deem the allegations in the amended complaint to be admitted as true. We grant the General Counsel's Renewed Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Taylor, Michigan, has been engaged in the business of cleaning, selling, and repairing intermediate bulk containers and chemical totes.

During the 12-month period preceding the issuance of the amended complaint, a representative period, the Respondent, in conducting its business operations described above, provided services valued in excess of $50,000 to enterprises located outside the State of Michigan, and derived gross revenues in excess of $1 million.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the International Union) and its Local 174 (Local 174), collectively

[1] 355 NLRB No. 8 (2010).

[2] Id., slip op. at 2 fn. 3. Chairman Liebman stated her view that "the complaint—while it could be clearer—adequately pleads the constructive discharge of the named employees under existing law," citing *RCR Sportswear, Inc.*, 312 NLRB 513, 513–514 (1993), enfd. 37 F.3d 1488 (3d Cir. 1994); *Control Services*, 303 NLRB 481, 485 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992); and *Lively Electric, Inc.*, 316 NLRB 471, 472 (1995).

the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, shipping inspection employees, and truck drivers employed by the Respondent, but excluding office clerical employees, and guards and supervisors as defined in the Act.

Since at least May 1, 2004, and at all material times, the International Union has been the designated exclusive collective-bargaining representative of the unit, and has been so recognized by the Respondent. This recognition is embodied in successive collective-bargaining agreements, the most recent of which was effective May 1, 2006, to April 30, 2009, and extended on April 23, 2009, for an additional 1-year term through April 30, 2010 (the current contract).

At all material times since at least May 1, 2004, based on Section 9(a) of the Act, the International Union has been the exclusive collective-bargaining representative of the unit.

At all material times until about February 2009, the International Union designated Local 174 as its servicing representative of the unit.

Since about February 2009, the International Union has functioned as servicing representative of the unit.

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act, and its agents within the meaning of Section 2(13) of the Act:

Bruce Smith	Owner and President
Brian Smith	Operations Manager
Randy Eick	Account Manager

The amended complaint alleges that the Respondent engaged in the following conduct:

1. Since about late 2007, the Respondent has failed to make IRA contributions for eligible unit employees, as required by article XIII of the current contract.

2. Since about August 1, 2008, the Respondent has intermittently failed to compensate the unit at all for work they performed, as required by article XII, section 1, and by Exhibit A, of the current contract.

3. Since about October 31, 2008, the Respondent has failed to provide health insurance for the unit, as required by article XII, section 2, of the current contract.

4. Since about November 18, 2008, the Respondent has failed to deduct and remit union dues from those unit employees who authorized the deductions, as required by article II, sections 2 and 3, of the current contract.

5. The subjects described in paragraphs 1 through 4 relate to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purposes of collective bargaining.

6. The Respondent engaged in the conduct described in paragraphs 1 through 4 without the consent of the Union, and in violation of Section 8(d) of the Act.

7. By the conduct described in paragraphs 1 through 4 and 6, the Respondent is failing to adhere to the core economic provisions of its current contract with the Union.

8. The Respondent's conduct described in paragraphs 1 through 4 and 6 is inherently destructive of employee rights guaranteed in Section 7 of the Act.

9. By the conduct described in paragraphs 1 through 4 and 6, the Respondent caused the termination of its employees William Blunk, William Kachigian, James Powers, Kenneth Robinson, and Welton Seawright about May 1, 2009, and caused the termination of its employee John Blunk about May 4, 2009.

10. About May 7, 2009, the Respondent, by its agent Bruce Smith, refused to accept a contractual grievance filed by the Union on behalf of unit employee William Kachigian, or to bargain with the Union about the grievance.

11. About May 11, 2009, by its agent Randy Eick, and about May 13, 2009, by its agent Bruce Smith, the Respondent bypassed the Union and dealt directly with the unit regarding the subject matter of the rejected grievance described in paragraph 10 and the terms of unit employee William Kachigian's reinstatement.

12. By the conduct described in paragraphs 1 through 4 and 6 through 11, the Respondent is repudiating its current contract with the Union.

III. DISCUSSION

The Board, like the federal courts, has adopted a system of notice pleading. Our rules provide that the "complaint shall contain . . . a clear concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." 29 C.F.R. § 102.15(b). The General Counsel is not required to describe the evidence he will offer to prove the unfair labor practice.

As fully set forth above, in this case, the amended complaint alleged the following:

1. Since about late 2007, the Respondent has failed to make IRA contributions for eligible unit employees, as required by article XIII of the current contract.

2. Since about August 1, 2008, the Respondent has intermittently failed to compensate the unit at all for work they performed, as required by article XII, section 1, and by Exhibit A, of the current contract.

3. Since about October 31, 2008, the Respondent has failed to provide health insurance for the unit, as required by article XII, section 2, of the current contract.

4. Since about November 18, 2008, the Respondent has failed to deduct and remit union dues from those unit employees who authorized the deductions, as required by article II, sections 2 and 3, of the current contract.

5. The subjects described in paragraphs 1 through 4 relate to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purposes of collective bargaining.

6. The Respondent engaged in the conduct described in paragraphs 1 through 4 without the consent of the Union, and in violation of Section 8(d) of the Act.

. . . .

9. By the conduct described in paragraphs 1 through 4 and 6, the Respondent caused the termination of its employees William Blunk, William Kachigian, James Powers, Kenneth Robinson, and Welton Seawright about May 1, 2009, and caused the termination of its employee John Blunk about May 4, 2009.

The amended complaint thus pleads the unfair labor practice—unilateral changes in the core economic provisions of a collective-bargaining agreement—and pleads that the unfair labor practice caused the discharge of specified employees. The amended complaint sufficiently pleads constructive discharge as it has been defined in our jurisprudence.[3] Nothing else is required under a system of notice pleading. By failing to answer the amended complaint, the Respondent has admitted all of the allegations in the amended complaint.

Our dissenting colleague errs when he questions facts alleged in the amended complaint, specifically, the allegation of causality. The complaint clearly alleges that the Respondent's unlawful, unilateral changes in terms and conditions of employment "caused the termination" of the employees. Our colleague asks how that can be so when the changes began 6 to 17 months before the constructive discharges. That is a question that the Respondent could have asked had it filed an answer. The Respondent could have then demanded that the General Counsel prove the causal link between the unfair labor practices and the employees' choice to leave the Respondent's employment. But the Respondent chose not to answer the amended complaint and thus we are required to deem all the allegations, including the allegation that the unlawful, unilateral changes caused the discharge of the employees, "to be admitted to be true." 29 C.F.R. § 102.20.

Moreover, contrary to our dissenting colleague's suggestion, there is no inconsistency between the facts alleged concerning the unlawful, unilateral changes and the facts alleged concerning the cause of the employees' leaving the Respondent's employment. The amended complaint alleges that the unilateral changes began as early as "late 2007" and that the employees left the Respondent's employ in May 2009. But because no answer was filed and thus no evidence offered, we can only speculate about what the evidence would have shown concerning the precise nature and timing of the unlawful acts and their effect on the employees. Thus, for example, the amended complaint alleges that "[s]ince about August 1, 2008, the Respondent has intermittently failed to compensate the unit at all for work they performed, as required by . . . the current contract." Consistent with that allegation, the General Counsel might have offered evidence that the Respondent's breach of contract began in August 2008 and continued unchanged until May 2009 as our colleague appears to assume. If that had been the evidence offered at trial, our colleague might rightly ask why did the employees wait so long to leave employment if the unilateral changes forced them to do so.[4] But the General Counsel might also have offered evidence that what began as an occasional failure to pay wages in August 2008 turned into a continuous failure to pay wages shortly before the employees left the Respondent's employ in May 2009. The General Counsel is not required to plead evidence and we cannot speculate about what

[3] In *Control Services*, supra at 485–486, for example, the Board found that a reduction in total hours worked and the elimination of health insurance benefits constituted a constructive discharge, as employees were required to work under conditions that were in derogation of the right to bargain.

[4] We note, however, that there is nothing inherently suspect in employees attempting to endure such unlawful conduct before ultimately being driven to resignation. Moreover, although a temporal lag between an employer's unlawful conduct and an employee's resignation is not irrelevant, the applicable standard is ultimately an objective one. See *LaFavorita, Inc.*, 306 NLRB 203, 205 (1992), enfd. mem. 977 F.2d 595 (10th Cir. 1992); *EDP Medical Computer Systems*, 284 NLRB 1232, 1234 (1987), enfd. by consent order (2d Cir. Oct. 22, 1987). The employees' apparent forbearance even assuming no increase in the severity of the Respondent's conduct is not inconsistent with constructive discharge as a matter of law. *Comgeneral Corp.*, 251 NLRB 653, 657–658 (1980), cited by the dissent, is not to the contrary. There, the employees who quit either did not engage in protected concerted activities in the first instance or quit based on the purely speculative anticipation of an upcoming discharge by the employer.

the evidence would have shown in this case. We are bound to accept the allegation of causality as true.[5] We therefore grant the renewed motion for default judgment in full.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraphs 1 through 4 and 6 through 12, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.

2. By the conduct described above in paragraphs 7 through 9, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by violating the provisions of its current contract with the Union by failing to (1) make IRA contributions; (2) compensate unit employees for work they performed; (3) provide health insurance; (4) deduct and remit union dues pursuant to valid dues-checkoff authorizations; and (5) accept and bargain with the Union about a contractual grievance filed on behalf of a unit employee, we shall order the Respondent to honor the terms and conditions of its current contract with the Union, and any further automatic renewal or extension of it, until a new agreement or good-faith impasse in negotiations is reached. In addition, in order to remedy the violations of the agreement, we shall order the Respondent to make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's failure to compensate unit employees for work they performed. Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6] In addition, we shall order the Respondent to restore the employees' health insurance coverage and to make all contractually-required IRA contributions that have not been made since late 2007, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[7] Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make the required IRA and health insurance contributions, with interest, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F. 2d 940 (9th Cir. 1981).[8]

In addition, we shall order the Respondent to deduct and remit union dues pursuant to valid dues-checkoff authorizations that have not been deducted since November 18, 2008, with interest as prescribed in *New Horizons for the Retarded*, supra.

Further, we shall order the Respondent to cease and desist from bypassing the Union and dealing directly with unit employees regarding the subject matter of rejected grievances and the terms of reinstatement of unit employees, and we shall affirmatively order the Respondent to accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

Moreover, having found that the Respondent violated Section 8(a)(5), (3), and (1) by repudiating the provisions of its 2006–2009 collective-bargaining agreement with the Union, as extended, and causing the termination of its employees William Blunk, William Kachigian, James Powers, Kenneth Robinson, and Welton Seawright about May 1, 2009, and causing the termination of its employee John Blunk about May 4, 2009, we shall order the Respondent to offer these employees full reinstatement

[5] The one case cited by our colleague, *Nishimatsu Construction Co. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975), is inapposite as, in that case, the pleadings (read to include an exhibit to the complaint—the contract at issue) "disclose[d] on their face a fact that would defeat the appellee's claim"—that the defendant alleged to have breached the contract signed it only as an agent for a disclosed principal. Here, the allegation that the unlawful, unilateral changes began as early as late 2007 in no way defeats the constructive discharge claim for the reasons explained above. The allegation is entirely consistent with many sets of facts that would prove constructive discharge even accepting the dissent's careful cabining of such claims.

[6] In the amended complaint, the General Counsel seeks interest computed on a compounded quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Rogers Corp.*, 344 NLRB 504 (2005).

[7] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions to the funds during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that the Respondent otherwise owes the funds.

[8] The General Counsel's request regarding IRA contributions due prior to April 30, 2009, can be addressed at the compliance stage of this proceeding.

to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, we shall order the Respondent to make William Blunk, William Kachigian, James Powers, Kenneth Robinson, Welton Seawright, and John Blunk whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent shall also be required to remove from its files any reference to the unlawful termination of these employees, and to notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Smith Industrial Maintenance Corporation d/b/a Quanta, Taylor, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Violating the provisions of its current contract with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the International Union) and its Local 174 (Local 174), collectively the Union, by failing to (1) make Independent Retirement Account (IRA) contributions; (2) compensate unit employees for work they performed; (3) provide health insurance; (4) deduct and remit union dues pursuant to valid dues-checkoff authorizations; and (5) accept and bargain with the Union about contractual grievances filed on behalf of unit employees. The appropriate unit is:

> All production and maintenance employees, shipping inspection employees and truck drivers employed by the Respondent, but excluding office clerical employees, and guards and supervisors as defined in the Act.

(b) Bypassing the Union and dealing directly with unit employees regarding the subject matter of rejected grievances and the terms of reinstatement of unit employees.

(c) Refusing to accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

(d) Repudiating the provisions of its 2006–2009 collective-bargaining agreement with the Union, as extended.

(e) Causing the termination of unit employees by engaging in conduct that is inherently destructive of their statutory rights.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor the terms and conditions of its current contract with the Union, and any further automatic renewal or extension of it, until a new agreement or good-faith impasse in negotiations is reached, and make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's violation of the provisions of the agreement relating to payment for work performed by unit employees, with interest, in the manner set forth in the remedy section of this decision.

(b) Make all IRA contributions that have not been made since late 2007, and reimburse unit employees for any expenses ensuing from its failure to make the required IRA contributions, with interest, in the manner set forth in the remedy section of this decision.

(c) Restore health insurance coverage for the unit employees and reimburse unit employees for any expenses ensuing from its failure to make the required payments, with interest, in the manner set forth in the remedy section of this decision.

(d) Deduct and remit union dues pursuant to valid dues-checkoff authorizations that have not been deducted since November 18, 2008, with interest, in the manner set forth in the remedy section of this decision.

(e) Accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

(f) Within 14 days from the date of this Order, offer William Blunk, William Kachigian, James Powers, Kenneth Robinson, Welton Seawright, and John Blunk full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(g) Make William Blunk, William Kachigian, James Powers, Kenneth Robinson, Welton Seawright, and John Blunk whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of William Blunk, William Kachigian, James Powers, Kenneth Robinson, Welton Seawright, and John Blunk, and within 3 days thereafter, notify these employees in writing that this has been done and that the unlawful terminations will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Taylor, Michigan, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 2007.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

It is well established that the Board, like the federal courts, follows a notice pleading system in which the General Counsel shall issue a complaint which contains a clear concise description of the acts which are claimed to constitute unfair labor practices, but he is not required to describe with particularity the evidence he will offer to prove the unfair labor practice allegations. It is also well established that facts alleged in a complaint are deemed admitted by default in the absence of an answer. However, even when a respondent fails to answer a complaint, there remains the question whether the unchallenged facts are consistent with the complaint's legal conclusion which relies on them.[1] On this single point, I disagree with the majority's decision to grant default judgment on the allegation that the Respondent constructively discharged six employees.[2] In my view, the amended complaint's allegations about the length of time between the Respondent's unlawful contract breaches and the employees' quitting are inconsistent with the allegation that those unfair labor practices caused the employees to quit.

As stated in the General Counsel's renewed motion, the amended complaint's allegation of unlawful constructive discharge rests on the so-called Hobson's Choice constructive discharge theory applicable to employees who quit "after being confronted with a choice between resignation or continued employment conditioned on relinquishment of statutory rights." E.g., *Control Services,* 303 NLRB 481, 485 (1991), enfd. without opinion 975 F.2d 1551 (3d Cir. 1992). However, in *RCR Sportswear, Inc.*, 312 NLRB 513, 514 fn. 7 (1993), the Board abjured any suggestion "that employees are privileged to quit their employment whenever there is alleged a mere breach of a collective-bargaining agreement."

To establish a Hobson's Choice constructive discharge, the choice to give up statutorily-protected rights or face termination "must be clear and unequivocal and the employee's predicament not one which is left to inference or guesswork on his part. . . ." *Comgeneral Corp.*, 251 NLRB 653, 657–658 (1980), enfd. 684 F.2d 387 (6th Cir. 1982). The complaint alleges that the six employees left their employment on May 1 and 4, 2009, because of contract violations beginning 6 to 17 months earlier. Absent an answer, these allegations are deemed true, but they depict an employment situation that employees endured for months. Thus on the face of the admitted facts, it is not clear and unequivocal that when they finally quit work they did so because confronted

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See *Nishimatsu Construction Co. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975).

[2] I join my colleagues in granting the renewed motion for default judgment with respect to the allegation of contract repudiation in violation of Sec. 8(a)(5). I find no need to pass on the allegation of inherently destructive conduct inasmuch as finding this violation would have no effect on the make-whole remedy provided for contract repudiation.

with a choice between surrendering their collectively bargained contract rights or quitting.

Federal courts have insisted on "carefully cabin[ing] the theory of constructive discharge, '[b]ecause [such] claim[s] [are] so open to abuse by those who leave employment of their own accord.'" *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 187 (4th Cir. 2004) (a Title VII case) (quoting *Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir. 1989)). The Board can do no less, even when deciding a case on the merits of the uncontroverted complaint pleadings, when the facts alleged in the complaint are inconsistent with its legal claim. I would therefore deny the renewed motion for default judgment with respect to the constructive discharge allegations.

Dated, Washington, D.C. September 30, 2010

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT violate the provisions of our current contract with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the International Union) and its Local 174 (Local 174), collectively the Union, by failing to (1) make Independent Retirement Account (IRA) contributions; (2) compensate unit employees for work they performed; (3) provide health insurance; (4) deduct and remit union dues pursuant to valid dues-checkoff authorizations; and (5) accept and bargain with the Union about contractual grievances filed on behalf of unit employees. The appropriate unit is:

All production and maintenance employees, shipping inspection employees and truck drivers employed by the Respondent, but excluding office clerical employees, and guards and supervisors as defined in the Act.

WE WILL NOT bypass the Union and deal directly with unit employees regarding the subject matter of rejected grievances and the terms of reinstatement of unit employees.

WE WILL NOT refuse to accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

WE WILL NOT repudiate the provisions of our 2006–2009 collective-bargaining agreement with the Union, as extended.

WE WILL NOT cause the termination of unit employees by engaging in conduct that is inherently destructive of their statutory rights.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor the terms and conditions of our current contract with the Union, and any further automatic renewal or extension of it, until a new agreement or good-faith impasse in negotiations is reached, and WE WILL make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of our violation of the provisions of the agreement relating to IRA contributions, work performed by unit employees, health insurance, and the contractual grievance filed by the Union, with interest.

WE WILL make all IRA contributions that have not been made since late 2007, and WE WILL reimburse unit employees for any expenses ensuing from our failure to make the required IRA contributions, with interest.

WE WILL restore health insurance coverage for the unit employees and reimburse unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL accept and bargain with the Union about the contractual grievance filed on behalf of unit employee William Kachigian.

WE WILL deduct and remit union dues pursuant to valid dues-checkoff authorizations that have not been deducted since November 18, 2008, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer William Blunk, William Kachigian, James Powers, Kenneth Robinson, Welton Seawright, and John Blunk full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make William Blunk, William Kachigian, James Powers, Kenneth Robinson, Welton Seawright, and John Blunk whole for any loss of earnings and other benefits resulting from their terminations, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of William Blunk, William Kachigian, James Powers, Kenneth Robinson, Welton Seawright, and John Blunk, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

SMITH INDUSTRIAL MAINTENANCE CORPORATION D/B/A QUANTA